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Supreme Court, U.S.
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OFFICE OF THE CLERK

No. 99-

IN THE

Supreme Court of The United States

ROBERT H. BRAVER,

Petitioner,

v.

PARKER REAL ESTATE, INC.,

Respondent.

On Petition for a Writ of Certiorari to
The Oklahoma Supreme Court

PETITION FOR WRIT OF CERTIORARI

BARRY K. ROBERTS
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Attorney for Petitioner

October 6, 1999

39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Oklahoma Court of Civil Appeals misinterpret and misapply the provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, and its implementary rules promulgated by the Federal Communications Commission? Specifically:

   The Oklahoma appellate court erred by interpreting the provisions of 47 CFR § 64.1200 in such a way as to defeat the purposes of Congress in enacting the Telephone Consumer Protection Act, and thereby denying the Petitioner a federally-mandated, statutory right.

   The Oklahoma appellate court erred by rendering an opinion which is in direct conflict with the interpretation by the Federal Communications Commission of the statute and rule in issue.

LIST OF PARTIES

Petitioner [Plaintiff in the District Court of Cleveland County, Oklahoma, and Appellant in the Oklahoma Supreme Court]:

ROBERT H. BRAVER

Respondent [Defendant in the District Court of Cleveland County, Oklahoma, and Appellee in the Oklahoma Supreme Court]:

PARKER REAL ESTATE, INC.,
An Oklahoma Corporation.

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OPINIONS BELOW

1. The Oklahoma Court of Civil Appeals rendered its opinion on May 18, 1999.

2. The Oklahoma Supreme Court denied petitioner's petition for certiorari to review the lower court's ruling on July 8, 1999.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the decision of the Oklahoma appellate courts under 28 U.S.C. §1257:

> (a) Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where... any right, title, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of... the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Article VI, Clause 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of a State to the Contrary notwithstanding.

United States Code, Title 47:

Section 227. Restrictions on the use of telephone equipment. Due to the length of the statute, the pertinent text is set out in Appendix B.

Code of Federal Regulations:

47 CFR §64.1200. Subpart L – Restrictions on Telephone Solicitation. Due to the length of the regulation, the pertinent text is set out in Appendix C.

INTRODUCTION

The petitioner, Robert Braver, seeks a writ of certiorari to the Oklahoma Supreme Court to review an opinion which was rendered by the subordinate, Oklahoma Court of Civil Appeals, Division 4. That opinion addressed an issue of first impression in Oklahoma: The rights and requirements of a consumer who brings an action against a telemarketer for an alleged violation of the federal Telephone Consumer Protection Act of 1991.[1]

It is the petitioner's contention that the Oklahoma appellate courts misinterpreted the statutory language of the Act in such a way as to deprive him of a right of action which was conferred by Congress.

The Act in question is sweeping federal legislation which was designed and intended to provide protection for all residential telephone subscribers from unwanted and intrusive telemarketing calls. It is nation-wide in its application and it creates rights in literally hundreds of millions of American citizens. But, as the petitioner learned in the course of this case, there is very little guidance to the public and to the courts

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[1] 47 U.S.C. §227.

as to exactly what rights are created, and as to how the Act is to be applied and interpreted by the state courts.

So, then, the petitioner comes before the Court to seek correction of the misinterpretation of a federal statute by a state court, and also in the hope that the facts and circumstances of this case will provide an opportunity for the Court to address the provisions of the Act which are in issue here, and thereby to assist consumers, telemarketers, and courts in understanding the scope and limitations of the rights guaranteed under the Act.

STATEMENT OF THE FACTS AND OF THE CASE

The petitioner, Robert Braver, received several telephone calls at home from real estate agents over a period of sixteen months, in which the callers identified themselves as representing the respondent, Parker Real Estate, Inc. Each of the callers tried to persuade Mr. Braver to use his or her professional services to broker the sale of his home. On each occasion, Mr. Braver declined the offer of services and told the caller that he wanted his name entered on the caller's "do-not-call list."

Nevertheless, the calls continued until finally Mr. Braver wrote a letter to Mr. Lloyd W. Parker, owner of Parker Real Estate, Inc.. In response, Parker wrote back to Mr. Braver in a letter dated April 4, 1996, in which he wrote, "we will put you on our list of those people who do not want to be called." Despite this assurance, Mr. Braver received another telephone solicitation from a realtor acting on behalf of Parker on April 22, 1997. Mr. Braver then wrote Parker and stated that he believed himself entitled to damages under 47 U.S.C. §227, the Telephone Consumer Protection Act (TCPA).[2]

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[2] Appendix B.

When Mr. Braver did not receive satisfaction from his communications with Parker, he filed suit in the Small Claims Division of the District Court of Cleveland County, Oklahoma, on February 10, 1998. On March 10, 1998, the parties appeared before The Hon. Reginald D. Gaston and the matter was tried. Mr. Braver presented evidence of the telephone calls and advised the court of the applicability and controlling authority of the TCPA. Citing the provisions of that Act, Mr. Braver testified:

- He asked for a copy of Parker's "do-not-call" policy but did not receive it.

- The people who called him on Parker's behalf did not provide him with a telephone number or address where they or their principal could be contacted.

- At least four calls were made to Mr. Braver at his home following his first specific "do-not- call" request.

Parker appeared by and through Mr. Lloyd Parker, who testified:

- The real estate agents who called Mr. Braver were independent contractors over whom he had no control.

- Parker did maintain a "do-not-call" list, and that Mr. Braver's name was on it.

- Parker is not in the telemarketing business.

At the conclusion of all evidence[3] the court entered judgment in favor of the defendant, Parker. Mr. Braver appealed this decision and the matter was assigned to the Oklahoma Court of Civil Appeals, Division 4 for an opinion.

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[3] Because this matter was tried in the Small Claims division by Mr. Braver pro se, no stenographic record was made. The parties and the trial court prepared and filed a Narrative Statement of the evidence in accordance with Oklahoma Supreme Court rules.

ARGUMENT

In its opinion,[4] the Court of Civil Appeals recounted the foregoing facts and reviewed portions of the TCPA, and quoted one of the rules made by the Federal Communications Commission (FCC) to implement the TCPA.[5] A portion of the rule is quoted verbatim at page 5 of the opinion, and it is that portion which says it is a violation of the Act for a person to make a telemarketing call to a residence "before the hour of 8 a.m. or after 9 p.m."[6] **and** "unless such person ...has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations."[7]

The Court seized upon the word "and" and applied strict rules of statutory construction to reach the conclusion that the two provisions were conjunctive, and that both elements had to be proven to make out a violation of the Act. Since the record does not show at what time Mr. Braver was called, the Court concluded "Braver failed to show **any** violation."[8] The ruling of the trial court was affirmed on this single basis.

Upon receipt of this opinion, the petitioner petitioned the Oklahoma Supreme Court for a writ of certiorari to review and correct the opinion of the Court of Civil Appeals. As part of the petition proceedings, petitioner submitted to the Oklahoma Supreme Court his Notice of Supplemental Authority. This

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[4] Appendix A-2.

[5] 47 CFR §64.1200, Appendix C.

[6] *Id.*, sub-paragraph (e)(1).

[7] *Id.*, sub-paragraph (e)(2).

[8] Appendix A-2, Opinion, page 6.

authority consisted of an informal, advisory opinion by the office of the General Counsel of the Federal Communications Commission.[9] That opinion discussed the facts of this case, the applicable federal law, and addressed the opinion of the Oklahoma Court of Civil Appeals by saying:

> In conclusion, sections 64.1200(e)(1) and 64.1200(e)(2) of the Commission's rules impose separate and independent restrictions on telephone solicitations. Persons and entities must comply with both rules; failure to comply with *either* of these rules is an actionable violation under the TCPA. Therefore, Braver can demonstrate a violation of the TCPA and the Commission's rules by proving that Parker initiated a telephone solicitation to Braver in violation of his do-not-call request, regardless of the time of day the telephone solicitation occurred.[10]

In spite of this authority, the petition was denied by an order of the Oklahoma Supreme Court dated July 8, 1999.[11]

REASONS FOR ALLOWANCE OF THE WRIT

The Oklahoma court of last resort has decided an important question of federal law that has not been, but should be, settled by this Court, and has decided an important federal question in a way that conflicts with relevant decisions of this Court. Specifically, the Oklahoma courts misapplied rules of statutory

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[9] Appendix D.

[10] *Id.*, page 6.

[11] Appendix A-1.

construction to the regulations promulgated by the Federal Communications Commission (FCC) in such a way as to nullify a right of action specifically granted to petitioner, as a residential telephone subscriber, by an act of Congress. The rules used by the Oklahoma courts were applied in such a way as to be clearly in conflict with this Court's guidance on construction and application of federal statutes. Further, the actions of the Oklahoma courts conflict with this Court's rulings which guarantee to all citizens the rights and privileges conferred by federal legislation.

It is axiomatic that state courts are bound equally with federal courts by the federal constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.[12]

The ruling of the Oklahoma Court of Civil Appeals violates this mandate and it is wrong for several reasons. First and foremost, the petitioner proved other violations of the Telephone Consumer Protection Act (TCPA) which have nothing to do with the provision cited. Specifically, under subsection (e)(2)(iii) of 47 C.F.R. §64.1200, "If a person... making a telephone solicitation...receives a request from a residential telephone subscriber not to receive calls from that person...the person...**must** record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. Further, (iv) says a "person or entity making telephone solicitation **must** maintain a record of a caller's request not to receive future telephone solicitations. A do not call request **must** be honored for 10 years from the time the request is made." (emphasis added) Although there are no published federal court opinions on point, these provisions have been addressed by the New Jersey Superior

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[12] *Public Service Co. of Utah v. Wycoff Co.*, 73 S.Ct. 236, 242, 344 U.S. 237, 97 L.Ed 291 (1952).

Court, which held that it is a violation of this section when a plaintiff's name is not placed on the company's do-not-call list at that person's very first request.[13] Here, the facts are not disputed that Mr. Braver made such a request, but that he nonetheless received subsequent calls.

Those subsequent calls constitute a violation of the TCPA, regardless of the time of day they were made. So, even if the Court of Civil Appeals were correct in its interpretation of sub-paragraphs (e)(1) and (e)(2), there was at least one other violation of the Act, and it was therefore incorrect for that court to conclude there had not been **any** violation; there was a violation of a provision other than the ones under that court's scrutiny.

On the other hand, Mr. Braver asked for a copy of Parker's do not call policy, but Parker never produced one and did not present such a policy at trial. Clearly, it is also a violation of the above-noted regulation if the company either does not have such a policy, or does not make a copy of that policy available to a consumer on demand.

Also, Mr. Braver proved that the persons who called him on Parker's behalf failed to provide him the telephone number or address of the "entity on whose behalf" the call was made. This alone constitutes a violation of the regulation in question.[14]

As to the issue of restricted calling hours, a Memorandum Opinion and Order adopted by the FCC, (FCC 95-310) addresses the issue of the restricted hours by saying, "Under Commission rules, **no** telephone solicitation calls may be made prior to 8 a.m. or after 9 p.m." (emphasis added) Clearly, the

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[13] *Szefczek v. Hillsborough Beacon*, 668 A.2d 1099 (N.J. Super. 1995).

[14] 47 CFR §64.1200(e)(2)(iv).

restriction on calling hours exists independently of the requirement to have a do not call policy, and this restriction is not considered part of the subsequent requirement. Put another way, how could any requirement be said to be conjunctive with the restricted hours, when **no** calls are allowed during the restricted hours?

Finally, the narrow, conjunctive interpretation given by the Court of Civil Appeals to the wording of the FCC regulation creates a result which is clearly contrary to the stated policy to be served by the TCPA. Part of the legislative history of the TCPA, in the form of House Report No. 102-317,[15] was presented to the Court of Civil Appeals, and in it Congress notes that the purpose of the Act is to address, among other things, that unrestricted telemarketing can be an intrusive invasion of privacy and that many consumers are outraged at the proliferation of intrusive, nuisance calls to their homes from telemarketers. If the reasoning of the Court of Civil Appeals is carried to its conclusion, then there would be no recourse for consumers at all unless the calls occurred prior to 8 a.m. or after 9 p.m..

Further, since the opinion finds there wasn't **any** violation, even though Braver proved he requested in vain to be placed on Parker's do-not-call list, and even though the callers failed to provide him with the information mandated by the Act, the court has in effect said that a telemarketing call can be made with impunity so long as it is done between 8:01 a.m. and 8:59 p.m., heedless of a do-not-call request, and even if required information is not given, and that is clearly not what Congress intended.

This Court has held that the duty in statutory interpretation is to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious

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[15] Appendix E.

with its scheme and the general purposes Congress manifested.[16] And, most specifically to the case at hand, the Court has ruled that statutory interpretation requires more than concentration on isolated words; rather consideration must be given to the total corpus of pertinent law and the policies that inspired the ostensibly inconsistent provisions.[17]

The explanation of the TCPA and the implementing FCC rules as contained in the General Counsel's advisory opinion shows that Congress intended to provide relief for consumers from intrusive telemarketing calls, and it is clear that the Act and the rules always should be construed to further that end, not to restrict it. This advisory opinion is especially important in resolving this case because the Court has held that, in addition to the importance of legislative history, a court may accord great weight to the interpretation placed on a statute by the agency charged with its administration.[18] Further, agency regulations promulgated on the federal level are to be given the force of federal statutory law and similarly have the power of the supremacy clause of the Constitution.[19]

Clearly, the Oklahoma courts disregarded all these rules and constraints and misinterpreted the federal law and by doing

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[16] *C.I.R. v. Engle*, 104 S.Ct. 597, 604, 464 U.S. 206, 78 L.Ed.2d 420 (1984).

[17] *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 90 S.Ct. 1583, 1592, 398 U.S. 235, 26 L.Ed.2d 199 (1970).

[18] *N.L.R.B. v. Bell Aerospace Co.*, 94 S.Ct. 1757, 1762, 416 U.S. 267, 40 L.Ed.2d 134 (1974).

[19] *Wyoming Hospital Authority v. Harris*, 527 F.Supp. 551, 5576 (D.C. Wyo. 1981), citing: *Free v. Bland*, 82 S.Ct. 1089, 369 U.S. 663 8 L.Ed.2d 180 (1962).

so denied Mr. Braver his federally-mandated rights. As has been said many times, state courts, like federal courts have a constitutional obligation to uphold federal law.[20] Furthermore, legislation enacted by Congress pursuant to the United States Constitution is biding on all state officials, including judges.[21]

These are the rules of law which the petitioner argues should be addressed by this Court on certiorari.

CONCLUSION

The Oklahoma courts, from the Small Claims division to the Court of Civil Appeals to the Supreme Court, had a mandatory duty to recognize and give effect to the plain intent of Congress in enacting the TCPA, but each of these courts – though fully advised of federal law – failed to do so. The uncorrected ruling of the Court of Civil Appeals makes it virtually impossible for Mr. Braver (or any other residential telephone subscriber) to ever successfully assert the rights Congress intended him to have.

For these reasons, this Court should issue certiorari ensure that the rights conferred by the Telephone Consumer Protection Act of 1991 are recognized by the courts of Oklahoma, and that the federal laws are fully implemented.

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[20] *Stone v. Powell*, 96 S.Ct. 3037, 3052, n.35, 428 U.S. 465, 49 L.Ed.2d 1067 (1976).

[21] *In re Wallace*, 170 F.Supp. 63 (D.C. Ala. 1959), citing: *Ex parte Virginia*, 100 U.S. 339, 25 L.Ed. 676 (1879).

WHEREFORE, the petitioner, Robert H. Braver, prays that this petition be GRANTED, and that certiorari issue.

Respectfully submitted,

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(405) 329-1974
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October 6, 1999

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APPENDIX A:

A-1: Order Sheet Entry of the Oklahoma Supreme Court, July 8, 1999, *Robert H. Braver v. Parker Real Estate, Inc.*, Case No. 91,121.

A-2: Opinion of the Oklahoma Court of Civil Appeals, Division 4, May 18, 1999, *Robert H. Braver v. Parker Real Estate, Inc.*, Case No. 91,121

APPENDIX B: Excerpts, 47 U.S.C. §227, Telephone Consumer Protection Act of 1991.

APPENDIX C: Excerpts, 47 C.F.R. §64.1200, Subpart L – Restrictions of Telephone Solicitation.

APPENDIX D: Advisory Opinion of the General Counsel, Federal Communications Commission, June 25, 1999.

APPENDIX E: Excerpts, House Report No. 102-317.

Appendix A-1

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Thursday, July 8, 1999

THE CLERK IS DIRECTED TO ENTER THE FOLLOWING ORDERS OF THE COURT:

* * *

91,121 Robert H. Braver v. Park (sic) Real Estate, Inc.

Application to strike supplemental authority denied; certiorari denied.

CONCUR: Summers, C.J., Hargrave, V.C.J., Hodges, Lavender, Simms, Kauger, Watt, JJ.
DISSENT: Wilson, J.

* * *

Appendix A-2

IN THE COURT OF CIVIL APPEALS
STATE OF OKLAHOMA
DIVISION 4

ROBERT H. BRAVER, Plaintiff/Appellant,	)	
vs.	)	No. 91,121
	)	NOT FOR
PARKER REAL ESTATE, INC. Defendant/Appellee.	)	PUBLICATION

APPEAL FROM THE DISTRICT COURT OF
CLEVELAND COUNTY, OKLAHOMA

Honorable Reginald Gaston, Trial Judge

Barry K. Roberts
Norman, Oklahoma — For Plaintiff/Appellant

Roger O. Housley
Norman, Oklahoma — For Defendant/Appellee

MEMORANDUM OPINION

RAPP, J.

The trial court plaintiff, Robert H. Braver ("Braver")appeals a judgment entered in favor of the trial court defendant, Parker Real Estate, Inc. ("Parker").

I. Background

Braver sued Parker in small claims court and claimed statutory damages for an alleged violation of the Federal Telephone Consumer Protection Act, 47 U.S.C. §227. The appellate record contains an agreed and approved narrative of the small claims court trial.

The undisputed portion of the evidence demonstrated that Braver received five telephone calls at his residence between January 1996, and April 1997, from individuals who identified themselves as representatives of Parker. These individuals sought to have Braver engage their services as real estate agents to assist him in selling his residence. On each such call, Braver requested that he not be contacted again and that his name be placed on a "do not call" list. After the fourth call, Braver wrote a letter to Parker demanding that his name be placed on a "do not call" list. Parker's response assured Braver that his name would be on the list.[1]

Nevertheless, Braver received an additional fifth telephone call of the same nature as the prior telephone calls subsequent to the exchange of correspondence.[2] Braver then went to Parker's office and met with Mr. Parker. Braver advised him of the Act's provisions and requested a copy of the company's "do not call" policy but it was not provided. Mr. Parker

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[1]The narrative statement acknowledges that the correspondences were not presented as exhibits but were provided to the court at trial. Small Claims procedures require only the "production" of documents and the hearing is informal. 12 O.S. Supp. 1998, §1761.

[2]Braver testified that at least four telephone calls were made to his home after his "do not call" request. The narrative does not make clear whether these were made following the in person meeting or after his oral communication to the caller. The damages requested totaled $1,500.00 which would be equal to the statutory damages for three violations.

advised Braver that the Act did not apply to Parker Real Estate, Inc. because the company was not a telemarketing company.

Braver testified that Parker did not have a "do not call policy" or procedures to maintain a "do not call" list whenever the telephone calls were made to him. The persons telephoning Braver did not provide a telephone number or address where Parker could be reached. The narrative does not reflect that Parker refuted or controverted this part of Braver's testimony.

Mr. Parker, testifying on behalf of the defendant Parker, stated that he was a real estate broker. Several real estate agents are associated with his company. He characterized these agents as independent contractors over whom he had no control. Mr. Parker stated that he had list of do not call numbers and that Braver was on the list. He testified that he was not in the telemarketing business and that no solicitations under the act transpired. Moreover, he said that real estate is not sold over he telephone. He testified that when a listing is obtained persons in the area are telephoned to ascertain whether they know of any potential buyers. In addition, they may be asked whether they have interest in selling their home. Last, he said that he personally had never telephoned Braver.

The trial court entered a general judgment for Parker. Braver appeals.

II. Standard of Review

The decision of the trial court, sitting as a trier of fact, is entitled to the same consideration, on appeal, as that given to a jury. Dismuke v. Cseh, 1992 OK 50, 830 P.2d 188. The proper standard of review in an action at law is that the findings of the trial court are as binding on appeal as the verdict of a jury, and if here is competent evidence to support the findings, they will not be disturbed on appeal. Id. Here, to the extent that the facts are not disputed, the appeal presents only a

question of law. Baptist Building Corp. v. Barnes, 1994 OK CIV APP 71, ¶ 5, 874 P.2d 68, 69. The appellate court has the plenary, independent and nondeferential authority to reexamine a trial court's legal rulings. Neil Acquisition L.L.C. v. Wingrod Investment Corp., 1996 OK 125, 932 P.2d 1100, Fn.1. Matters involving legislative intent present questions of law which are examined independently and without deference to the trial court's ruling. Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991); Keizor v. Sand Springs Ry. Co., 1993 OK CIV APP 98, ¶5, 861 P.2d 326, 328.

III. Analysis and Review

The issues in this appeal are first, whether the Act applies to Parker, and second, whether Parker violated a specific provision of the Act and the regulations promulgated under the Act. The parties commendably agree that, as to the second issue, the case is brought under 43 (sic) U.S.C. §227(c)(5) and 47 CFR §64.1200(e). Section 227(c)(5) affords a private right of action for violation of the Act or regulations promulgated under the Act. The Act directs that the Federal Trade Commission ("FTC")(sic) promulgate regulations and, for purposes of the appeal here, Section 64.1200(e) of the regulations specifies what constitutes a violation of the Act. Section 64.1200(e) provides, in part:

> (E) no person or entity shall initiate any telephone solicitation to a residential telephone subscriber:
>
> (1) Before the hour of 8 a.m. or after 9 p.m. (Local time at the called party's location, and
>
> (2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity.

The regulation continues with a list minimum standards (sic) which the procedures must meet. The minimum standards require: (1) personnel training; (2) maintenance and nondisclosure to others of "do not call" records; (3) the identification of the telephone solicitor to the party called; (4) application of the procedures to affiliates; and (5) maintenance of "do not call" lists records for ten years. Thus, the regulation establishes two primary elements necessary for recovery.

This Court need not decide whether the Act applies to Parker under the facts because the evidence supports the conclusion that, regardless of applicability, Braver failed to prove any violation.[3] In short, Braver's evidence does not show that the alleged cal violations occurred before the hour of 8 a.m. or after 9 p.m. as required by the regulation.

Although the Act does not speak to time-periods, it does direct the FTC (sic), in its rulemaking function, to develop and implement regulations that are "most effective and efficient to accomplish" the purpose of protection of residential telephone subscribers' privacy rights. 47 U.S.C. §227(c). Braver does not contest here, not did he at trial, the FTC's (sic) authority to limit the Act's coverage to specific times of day. In fact, Braver in his presentation here specifically relies upon Section 64.1200(e) for his cause of action. His reference to the Act is to that part which affords a private action in state court. 42 (sic) U.S.C. §227(c) (5). Braver is bound to the theory

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[3] Parker maintained that: (1) there were no solicitations under the Act; (2) the calls were made by independent contractors; and, (3) Parker is not a telemarketer and the Act applies only to telemarketers. This Court observes, with respect to the first two points, that under the Act and the regulations telephone solicitations include solicitations of purchase of services and that no exception is made for independent contractors. 47 U.S.C. §227(a)(3) and (c)(5); 47 CFR § 64.1200(e)(2)v) and (f)(3).

presented at trial and briefed on appeal. Dixon v. Roberts, 1993 OK CIV APP 15, 853 P.2d 235.

Braver relies upon Szefczek v. Hillsborough Beacon, 286 N.J.Super. 247, 668 A.2d 1099 (1995), where a telemarketer was held liable for violation of the regulation. There, the recited facts demonstrated that the telemarketer had violated Section 64.1200(e)(2). However, the recital of facts did not indicate at what time of day the calls were made. Moreover, that court was not called upon to decide whether the plaintiff was required to prove both the timing of the calls and the additional violations.[4]

Next, Braver's argument requires that Section 64.1200(e)(1) be read as independent of Section 64.1200(e)(2), that is, that the word "and" be construed as the disjunctive word "or." The language of the regulation is expressed with the use of the conjunctive "and." The word "and" is commonly used in the conjunctive sense. It connects words and phrases to express the idea that the latter word or phrase is added to the first. The words are not synonymous. The word "or" is not substituted by interpretation for the word "and" unless there exists a clear intention that such construction is intended. State v. Klosowski, 310 A.2d 656, 661 (Del 1973); Petition of G. Kay, Inc., 219 Neb. 24, 361 N.W.2d 182, 184 (1985); In re Paront's Will, 39 Misc. 2d 285, 240 N.Y.s.2d 558, 561. Here, Braver does not demonstrate that "and" should be read other than in its conjunctive sense and no reason to do so is perceived by this Court.

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[4]See Tillman v. Distribution Systems of America, Inc., 224 A.D.2d (sic) 79, 85, 648 N.Y.S.2d 630, 634, in which the court there referenced the case as one involving unsolicited telephone calls during specific times of the day.

The foregoing construction of the word "and" is supported by the principles applicable to statutes that are penal in nature. The statutory damages established under the Act, and here requested by Braver, are in the nature of a penalty. The concept of "penalty" is not subject to precise definition. A "penalty" is an imposition of liability for doing a certain act without regard to whether the doing of the act injured any one or without regard to the relation between the extent of the injury and the liability. A penalty is punitive rather than compensatory in nature. Tulsa Ready-Mix Concrete Co. v. McMichael Concrete Co., 1972 OK 53, 495 P.2d 1279; Black's Law Dictionary, Fifth Edition, 1979, West Publishing Company, St. Paul, MN.

Penal statutes are construed strictly. Mid-Continent Pipeline Co. v. Crauthers, 1954 OK 61, 267 P.2d 568, 570. Strict construction is that which declines to extend the law by implication or equitable consideration and confines the law's application to cases clearly within the letter of the statue. State ex rel. Allen v. Bd. of Ed. of Indep. Sch. Dist. No. 74 of Muskogee County, 206 Okla. 699, 246 P.2d 368, 37f4. Therefore, the use of the word "and" creates two conditions necessary to establish liability under 47 CFR 64.1200(e).

Thus, it must be held that the evidence here before the trial court did not establish a violation of the regulation regardless of whether Parker was covered by the Act. In short, Braver here failed to prove his case.

The trial court judgment in favor of Parker is AFFIRMED.

AFFIRMED.

GOODMAN, P.J., and TAYLOR, J., concur.

May 18, 1999

Appendix B

[47 U.S.C.] § 227. Restrictions on the use of telephone equipment

(a) Definitions

As used in this section –

* * *

(3) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit corporation.

* * *

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the (Federal Communications) Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceedings shall –

* * *

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

* * *

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a

State bring in an appropriate court of that State –

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

Appendix C

47 CFR §64.1200

Subpart L -- Restrictions on Telephone Solicitation

§ 64.1200 Delivery Restrictions.

* * *

(e) No person or entity shall initiate any telephone solicitation to a residential telephone subscriber:

(1) Before the hour of 8 a.m. or after 9 p.m. (Local time at the called party's location), and

(2) Unless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(i) *Written policy.* Persons or entities making telephone solicitations must have a written policy, available upon demand, for maintaining a do-not-call list.

(ii) *Training of personnel engaged in telephone solicitation.* Personnel engaged in any aspect of telephone solicitation must be informed and trained in the existence and use of the do-not-call list.

(iii) *Recording, disclosure of do-not-call requests.* If a person or entity making a telephone solicitation (or on whose behalf a solicitation is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or

entity must record the request and place the subscriber's name and telephone number on the do-not-call list at the time the request is made. *If such requests are recorded or maintained by a party other than the person or entity on whose behalf the solicitation is made, the person or entity on whose behalf the solicitation is made will be liable for any failures to honor the do-not-call request.*

* * *

(v) *Affiliated persons or entities.* In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(vi) *Maintenance of do-not-call lists.* A person or entity making telephone solicitations must maintain a record of a caller's request not to receive future telephone solicitations. A do-not-call request must be honored for 10 years from the time the request is made.

(f) As used in this section:

* * *

(3) The term *telephone solicitation* means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission:

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.[1] (emphasis added)

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[1] The language of this rule is identical to that contained in 47 USC § 227 (a)(3).

Appendix D

Federal Communications Commission
Washington, D.C. 20554

June 25, 1999

Barry K. Roberts, Esq.
111 North Peters, Suite 435
Norman, OK 73069

RE: Robert H. Braver v. Parker Real Estate, Inc.
Case No. 91,121 (Oklahoma Court of Civil Appeals)

Dear Mr. Roberts:

As counsel for the plaintiff, Robert H. Braver (Braver), in the above-referenced litigation, you have sought assistance from the Federal Communications Commission (Commission) concerning the proper interpretation of the statutory and regulatory basis for Braver's claims therein, i.e., that Parker Real Estate, Inc. (Parker) has initiated telephone solicitations in violation of the Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227, and certain rules, i.e., 47 C.F.R. § 64.1200. The Commission cannot assert a definitive position regarding the merits of Braver's claims, because the Commission is neither a party to the litigation at issue nor privy to the validity of the alleged facts. However, I can provide an informal, advisory opinion regarding the meaning of the statutory and regulatory provisions apparently at issue in Braver's claims against Parker. I am providing you with this explanation with the understanding that Braver may wish to submit this letter to the Oklahoma Supreme Court (Supreme Court) in support of his pleadings.

Braver apparently alleges in the above-referenced litigation that Parker has initiated telephone solicitations in violation of the TCPA and the Commission's rules. Specifically, it appears that Braver alleges, inter alia, that Parker initiated telephone solicitations to Braver in violation of Braver's do-not-call request. It appears that Braver also alleges that Parker failed to provide Braver with a copy of parker's do-not-call policy upon request therefor. In Braver v. Parker, No. 91,121, (Okla. Ct. App. May 18, 1999), the Oklahoma Court of Civil Appeals (Court) apparently concluded that because Braver did not demonstrate that the telephone solicitations from Parker occurred before 8 a.m. or after 9 p.m., Braver did not prove a violation of the TCPA. For the reasons explained below, the Court's conclusion appears to be based on an erroneous interpretation of Commission rule 47 C.F.R. § 64.1200.

The TCPA mandated that the Commission establish regulations to protect the privacy rights of citizens by restricting the use of the telephone network for unsolicited advertising.[1] The TCPA recognizes the legitimacy of the telemarketing industry, but notes that unrestricted telemarketing can be an invasion of privacy and, in some instances, a risk to public safety.[2] Accordingly, in implementing the TCPA, the Commission adopted rules that balanced the privacy concerns that the TCPA seeks to protect against the continued viability of beneficial and useful business services. Specifically, the Commission considered which

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[1] 47 U.S.C. § 227. An "unsolicited advertisement" is defined as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

[2] See 47 U.S.C. § 227(c)(1).

methods would best accommodate residential telephone subscribers who do not wish to receive unsolicited advertisements, including live voice solicitations, while not unduly hampering the telemarketing industry.

After considering a number of options, the Commission concluded that requiring the maintenance of company-specific do-not-call lists would be the most effective and efficient means for telephone subscribers to avoid unwanted telephone solicitations.[3] Therefore, pursuant to section 64.1200(e)(2) of the Commission's rules, "[n]o person or entity shall initiate any telephone solicitation to a residential telephone subscriber ...[u]nless such person or entity has instituted procedures for maintaining a list of persons who do not wish to receive telephone solicitations made by or on behalf of that person or entity."[4] The Commission's rules further require that the foregoing procedures meet certain minimum standards, including the following: (1) persons or entities making telephone solicitations to residential telephone subscribers must have a written policy for maintaining a do-not-call list available upon demand; (2) personnel engaged in any aspect of telephone solicitations must be informed and trained in the use and existence of the do-not-call list; (3) a person or entity receiving a do-not-call request from a solicitee must place that individual on a do-not-cal list; and (4) a person or entity making telephone solicitations must honor each do-not-call request for 10 years from the time the request is made.[5] The

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[3] See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752, 8765 (1992) (TCPA report and Order).

[4] 47 C.F.R. § 64.1200(e)(2).

[5] See 47 C.F.R. § 64.1200(e)(2)(i)-(vi).

Commission's rules also require that each person or entity making a telephone solicitation, or on whose behalf the telephone solicitation is made, ultimately will be held responsible for maintenance of the do-not-call list and fully accountable for any problems arising in the maintenance and accuracy of the list.[6]

Pursuant to the TCPA, "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring [an action] in an appropriate court of that State...."[7] Such person may bring an action either to enjoin the violation, "to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater," or

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[6] See id.

[7] See 47 U.S.C. § 227(c)(5). See also TCPA Report and Order, 7 FCC Rcd at 8780, para. 55 (stating that the TCPA provides consumers a private right of action for, inter alia, "any violation of the guidelines for telephone solicitations"). Courts throughout the country have entertained actions alleging various violations of the TCPA. See, e.g., Arkow v. Bank of America, N.T.S.A., Municipal Court of the Newhall Judicial District, For the County of Los Angeles, State of California, Small Claims Division, Case No. S/C 95S00592 (finding that the Bank of America violated Section 64.1200(e)(2)(i) of the Commission's rules requiring a policy to be available upon demand by sending the policy five weeks after request therefor) ... ; Szefczek v. Hillsborough Beacon, 668 A.2d 1099 (N.J. Super. Ct. Small Claims Div. 1995) (finding that the defendant violated the TCPA by contacting the plaintiff in violation of her do-not-call request).

both.[8]

The Commission also has imposed time of day restrictions on telephone solicitations. These restrictions are independent of the other requirements for making telephone solicitations. In particular, pursuant to section 64.1200(e)(1) of the commission's rules, "no person or entity shall initiate any telephone solicitation to a residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (Local time at the called party's location)."[9] Telephone solicitations conducted outside of these calling hours constitute independent violations of the Commission's rules, regardless of compliance or non-compliance with other statutory requirements.[10]

Given the foregoing, it appears that the Court in Braver v. Parker may have incorrectly concluded that to demonstrate a violation of the TCPA, Braver must prove both a violation of the time of day restrictions and a violation of the Commission's rules for maintaining a do-not-call list. As discussed above, a violation of the Commission's rules regarding the maintenance of a do-not-call list, 47 C.F.R. § 64.1200(e)(2), is independent of a violation of the Commission's time of day restrictions, 47 C.F.R. § 64.100(e)(1). For example, a person or entity who initiates a telephone solicitation to an individual despite that individual's do-not-call request has violated the Commission's telephone solicitation rules, regardless of the time of day the person or entity initiated the solicitation. On the other hand, a person or entity who initiates a telephone solicitation to an individual before 8 a.m. or after 9 p.m. has violated the commission's telephone solicitation rules, regardless of

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[8] See 47 U.S.C. § 227(e)(5)(A)-(C).

[9] 47 C.F.R. § 64.1200(e)(1).

[10] See TCPA Report and Order, 7 FCC Rcd at 8767-68, paras. 25-26.

whether the solicitee has made a previous do-not-call request.

In conclusion, sections 64.1200(e)(1) and 64.1200(e)(2) of the Commission's rules impose separate and independent restrictions on telephone solicitations. Persons and entities must comply with both rules; failure to comply with either of these rules is an actionable violation under the TCPA. Therefore, Braver can demonstrate a violation of the TCPA and the Commission's rules by proving that Parker initiated a telephone solicitation to Braver in violation of his do-not-call request, regardless of the time of day the telephone solicitation occurred.

We hope this information is helpful. Please do not hesitate to contact me at (202) 418-1740 if you have any questions.

Sincerely,

Daniel M. Armstrong
Associate General Counsel

Appendix E

HOUSE REPORT NO. 102-317 November 15, 1991

[To accompany H.R. 1304]

* * *

SEC. 2. FINDINGS.

The Congress finds that:

(1) The use of the telephone to market goods and services to the home and other businesses is now pervasive due to the increased use of cost-effective telemarketing techniques.

(2) Over 30,000 businesses actively telemarket goods and services to business and residential customers.

(3) More than 300,000 solicitors call more than 18,000,000 Americans every day.

(4) Total United States sales generated through telemarketing amounted to $435,000,000,000 in 1990, a more than four-fold increase since 1984.

(5) Unrestricted telemarketing, however, can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.

(6) Many consumers are outraged [by] the proliferation of intrusive, nuisance calls to their homes from telemarketers.

(7) Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.

(8) The Constitution does not prohibit restrictions on commercial telemarketing solicitations.

(9) Individuals privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices.

SEC. 3. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

Title II of the Communications act of 1934 is amended by

inserting immediately after section 226 (47 U.S.C. 226) the following *new section:*

"SEC. 227. RESTRICTIONS ON THE USE OF TELEPHONE EQUIPMENT FOR ADVERTISING.

[Text of 47 U.S.C. § 227 follows]

* * *